Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 13 November 2025[1] [i]

Case C-557/24 P

Malacalza Investimenti Srl,
Vittorio Malacalza
v

European Central Bank (ECB)

(Appeal – Economic and monetary policy – Non-contractual liability – Decisions taken by the European Central Bank (ECB) concerning Banca Carige – Directive 2014/59/EU – Recovery and resolution of credit institutions – Articles 27 to 29 – Early intervention measures – Regulation (EU) No 1024/2013 – Article 4(3) and Article 16 – Decision of the ECB to submit a bank to early intervention measures – Imposition of enhanced prudential requirements – Impact on the rights of shareholders and the ECB's non-contractual liability)

1. Malacalza Investimenti Srl and Mr Vittorio Malacalza brought an action before the General Court under Article 268 TFEU seeking compensation for the harm they claim to have suffered as a result of the conduct of the European Central Bank (ECB) in the exercise of its prudential supervisory function of Banca Carige between 2014 and 2019.

2. In its judgment of 5 June 2024, *Malacalza Investimenti and Malacalza* v *ECB* (T-134/21, EU:T:2024:362; 'the judgment under appeal'), the General Court dismissed that action. The applicants at first instance are now appealing that judgment to the Court of Justice.

3. My Opinion will focus on the early intervention measures that the ECB is able to adopt with regard to a credit institution in difficulty. I will examine whether and on what terms the shareholders of this institution have the right to bring an action for non-contractual liability against the ECB for damages suffered as a result of the implementation of such measures.

[1] Original language: Spanish.

I. Legislative framework

A. European Union law

1. Regulation (EU) No 1024/2013 [2]

4. Article 4 ('Tasks conferred on the ECB') establishes that:

'1. Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States:

…

(d) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;

(e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

(f) to carry out supervisory reviews, including where appropriate in coordination with EBA, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law;

…

(i) to carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers.

…

[2] Council Regulation of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

3. For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.

…'

5. Article 16 ('Supervisory powers') stipulates that:

'1. For the purpose of carrying out its tasks referred to in Article 4(1) and without prejudice to other powers conferred on the ECB, the ECB shall have the powers set out in paragraph 2 of this Article to require any credit institution, financial holding company or mixed financial holding company in participating Member States to take the necessary measures at an early stage to address relevant problems in any of the following circumstances:

(a) the credit institution does not meet the requirements of the acts referred to in the first subparagraph of Article 4(3);

(b) the ECB has evidence that the credit institution is likely to breach the requirements of the acts referred to in the first subparagraph of Article 4(3) within the next 12 months;

(c) based on a determination, in the framework of a supervisory review in accordance with point (f) of Article 4(1), that the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks.

2. For the purposes of Article 9(1), the ECB shall have, in particular, the following powers:

(a) to require institutions to hold own funds in excess of the capital requirements laid down in the acts referred to in the first subparagraph of Article 4(3) related to elements of risks and risks not covered by the relevant Union acts;

(b) to require the reinforcement of the arrangements, processes, mechanisms and strategies;

(c) to require institutions to present a plan to restore compliance with supervisory requirements pursuant to the acts referred to in the first subparagraph of Article 4(3) and set a deadline for its implementation, including improvements to that plan regarding scope and deadline;

(d) to require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements;

(e) to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution;

(f) to require the reduction of the risk inherent in the activities, products and systems of institutions;

(g) to require institutions to limit variable remuneration as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base;

(h) to require institutions to use net profits to strengthen own funds;

(i) to restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution;

(j) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions;

(k) to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities;

(l) to require additional disclosures;

(m) to remove at any time members from the management body of credit institutions who do not fulfil the requirements set out in the acts referred to in the first subparagraph of Article 4(3).'

2. Directive 2014/59/EU[3]

6. Article 27(1) ('Early intervention measures') states as follows:

'Where an institution infringes or, due, inter alia, to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1.5 percentage points, is likely in the near future to infringe the requirements of Regulation (EU) No 575/2013, Directive 2013/36/EU, Title II of Directive 2014/65/EU or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Regulation (EU) No 600/2014, Member States shall ensure that competent authorities have at their disposal, without prejudice to the measures referred to in Article 104 of Directive 2013/36/EU where applicable, at least the following measures:

(a) require the management body of the institution to implement one or more of the arrangements or measures set out in the recovery plan or in accordance with Article 5(2) to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a specific timeframe and in order to ensure that the conditions referred to in the introductory phrase no longer apply;

(b) require the management body of the institution to examine the situation, identify measures to overcome any problems identified and draw up an action programme to overcome those problems and a timetable for its implementation;

[3] Directive of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

(c) require the management body of the institution to convene, or if the management body fails to comply with that requirement convene directly, a meeting of shareholders of the institution, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;

(d) require one or more members of the management body or senior management to be removed or replaced if those persons are found unfit to perform their duties pursuant to Article 13 of Directive 2013/36/EU or Article 9 of Directive 2014/65/EU;

(e) require the management body of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable;

(f) require changes to the institution's business strategy;

(g) require changes to the legal or operational structures of the institution; and

(h) acquire, including through on-site inspections and provide to the resolution authority, all the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 36'.

7. Article 28 regulates the removal of senior management and the management body and Article 29 the figure of the temporary administrator.

B. Italian law: The TUB[4]

8. Article 53(1)(d-*bis*) entrusts the supervisory authority with the task of publishing information on credit institutions, in particular information on capital adequacy, risk limitation, shareholdings that may be held, governance and administrative or accounting organisation.

9. In accordance with Article 53-*bis*(1)(d), where the situation so requires, the supervisory authority may adopt specific measures in respect of one or more banks or the banking system as a whole. Such measures may include:

– restricting the bank's activities or geographical structure;

– prohibiting the bank from engaging in certain transactions, including corporate transactions, and from distributing profits or other elements of capital, as well as – in the case of financial instruments that could be included in capital for supervisory purposes – prohibiting the bank from paying interest;

– setting limits on the total amount of the variable part of remuneration within the bank, where this is necessary to maintain a solid capital base, and, in the case of banks that have been granted emergency public funding interventions, setting limits on the total remuneration of corporate officers.

[4] Decreto legislativo n. 385 – Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 – Consolidated Banking and Credit Law) of 1 September 1993 (GURI No 230 of 30 September 1993, and Ordinary Supplement to GURI No 92; 'the TUB').

10. In accordance with Article 69*octiesdecies*(1)(a), the Bank of Italy may implement the early intervention measures referred to in that text where, following a rapid deterioration in the situation of the bank concerned or its group, it identifies or anticipates, in particular, a breach of Regulation No 575/2013 and of Title II of Directive 2014/65. [5]

11. In accordance with Article 69*octiesdecies*(1)(b) and Article 70, the supervisory authority may place an institution under temporary administration in the event of serious infringements of laws or regulations, of serious irregularities in the management of the credit institution, where the deterioration in the situation of the bank or banking group is particularly significant, when serious losses of assets are foreseeable, or where temporary administration is requested by reasoned application from the administrative bodies or by the extraordinary general meeting of the credit institution.

12. Under Article 69*noviesdecies*, the Bank of Italy may request, where the conditions laid down in Article 69*octiesdecies*(1)(a) of the TUB are met, that a credit institution or the parent company of a banking group implement even in part the restructuring plan adopted, to prepare a plan to negotiate debt restructuring with all or some of the creditors or, where appropriate, to change their corporate form.

II. Facts of the case

13. The General Court set out the facts of the present case in paragraphs 2 to 25 of the judgment under appeal, and I will summarise them below.

14. Banca Carige is a credit institution of considerable size established in Italy which was listed on the stock exchange and was subject to direct prudential supervision by the ECB from 2014 onwards, in accordance with Regulation No 1024/2013.

15. Malacalza Investimenti and Mr Malacalza were shareholders of Banca Carige. [6]

16. On 23 April 2015, in order to remedy the capital shortfall that had been identified by the full assessment carried out by the ECB in 2014, the extraordinary general meeting of Banca Carige shareholders approved a capital increase of EUR 850 million.

17. On 9 December 2016, the ECB adopted an 'early intervention measure' which consisted of requesting that Banca Carige submit, by 28 February 2017, a strategic plan and an operational plan to reduce the issue of non-performing loans. Those plans were to provide a clear indication of the measures to be implemented and the schedule to be followed in order to achieve that objective.

18. In September 2017, in response to the early intervention measure, the Banca Carige board of directors approved a recapitalisation plan which included, inter alia, a capital increase of EUR 560 million to be implemented by the end of 2017. Following the approval of the prospectus

[5] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1) and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349).

[6] When this action was brought, Malacalza Investimenti held 15 288 774 ordinary shares, representing approximately 2.016% of the bank's capital, and Mr Malacalza held 121 017 ordinary shares, representing approximately 0.011% of the bank's capital. Mr Malacalza was a member and vice-president of the bank's board of directors from 31 March 2016 to 3 August 2018.

by the Commissione nazionale per le società e la borsa (National Companies and Stock Exchange Commission, Italy), the capital increase was finally completed on 21 December 2017, for an amount of EUR 544 million.

19. On 28 December 2017, the ECB notified Banca Carige of its decision establishing the prudential requirements for 2018. Subsequently, Banca Carige tried unsuccessfully to increase its own funds in order to meet the applicable requirements. An attempt to issue capital instruments failed three times in 2018 (in March, May and June) owing to a lack of interest on the part of investors.

20. Those failures exacerbated tensions within the Banca Carige board of directors over how to remedy non-compliance with own funds requirements and how to implement the 2017 recapitalisation plan.

21. The disagreements led to a number of resignations, including that of Mr Malacalza, which made it necessary to appoint a new board of directors.[7]

22. On 14 September 2018, in view of Banca Carige's failures in its attempt to place its capital instruments on the market, the ECB refused to approve the capital conservation plan drawn up by the bank and asked it to submit and obtain approval from its board of directors, by 30 November 2018 at the latest, a new plan to restore and ensure sustainable compliance with the financial requirements by 31 December 2018 at the latest.

23. On 12 November 2018, in order to respond to that request, Banca Carige's board of directors adopted a capital strengthening plan involving two steps, namely, first, the issue of Class 2 subordinated bonds and, second, an increase in capital subject to shareholder approval.

24. The first step was carried out with a bond subscription in the amount of EUR 318.2 million from the Fondo interbancario di tutela dei depositi (Voluntary Intervention Fund of the Interbank Deposit Protection Fund, Italy) ('the FITD') and EUR 1.8 million by Banco di Desio e della Brianza SpA.

25. The implementation of the second step met with opposition from Banca Carige's shareholders' meeting, which did not approve the capital increase, leading to the resignation of several members of its board of directors. This circumstance led to the disqualification of the board of directors, in accordance with Article 18(12) of Banca Carige's articles of association, on the one hand, and Article 2386 of the Italian Civil Code, on the other. The four members of the board of directors who had not resigned remained in office to ensure its day-to-day management.

26. On 1 January 2019, the ECB decided to place the bank under temporary administration in accordance with the provisions of the TUB, with the following effects:

– dissolution of the board of directors and replacement of former members by three temporary administrators, including Mr Modiano and Mr Innocenzi;

– dissolution of the supervisory committee and replacement of the former members by three other persons; and

[7] At the extraordinary general meeting of 20 September 2018, Banca Carige's shareholders appointed new directors and appointed Mr Modiano to the post of chair and Mr Innocenzi to that of managing director.

– assignment to the new bodies of a task consisting of taking the necessary steps to ensure that Banca Carige once again complies with asset requirements on a sustainable basis.

27. On 2 January 2019, the adoption of the decision to place the bank under temporary administration was announced by means of a press release. That measure was extended three times (on 29 March, 30 September and 20 December 2019) in order to stabilise Banca Carige's situation and to allow for conclusion of the operation to strengthen the capital base.

28. On 9 August 2019, Banca Carige, Cassa Centrale Banca – Credito Cooperativo Italiano, the FITD and the FITD's voluntary intervention fund signed a framework agreement setting out the characteristics of a business plan. This plan provided, in particular, for a capital increase of EUR 700 million and the issue of new Class 2 subordinated bonds.

29. On 18 September 2019, the ECB considered, on the basis of Article 56 of the TUB, that the proposed capital increase was not contrary to the sound and prudent management of the bank. On 20 September 2019, an extraordinary general meeting of Banca Carige's shareholders approved the capital increase of EUR 700 million.

30. On 31 January 2020, after the implementation of the capital increase, at the Banca Carige ordinary general meeting of shareholders, a new board of directors and a new supervisory board were elected. Following those elections, the temporary administrators and the supervisory committee transferred, on the same date, the administration of the bank to the newly elected bodies, thus putting an end to the temporary administration of Banca Carige.

III. The procedure before the General Court and the judgment under appeal

31. The applicants requested that the General Court order the ECB to pay Malacalza Investimenti the sum of EUR 870 525 670 and Mr Malacalza the sum of EUR 9 546 022 (or any other greater or lesser amount which is deemed fair, to be determined, if necessary, *ex aequo et bono*).[8]

32. According to the applicants, these damages were caused by the ECB's unlawful conduct in exercising its prudential supervisory functions over Banca Carige.

33. The ECB contested the claim.

34. The European Commission was granted leave to intervene in the proceedings in support of the ECB.

35. In the judgment under appeal (paragraph 28), the General Court found that the applicants put forward eight instances of unlawful conduct as grounds for the ECB's non-contractual liability, namely:

– the sufficiently serious breach by the ECB of Italian law when it failed to intervene to rectify misleading statements made about the soundness of Banca Carige by its directors;

– the sufficiently serious breach by the ECB of EU rules in its relations with the Banca Carige's board of directors;

[8] In addition, they sought, in so far as necessary, a declaration to the effect that the measures alleged to be unlawful were invalid.

– the sufficiently serious breach by the ECB of Italian law as regards the approval, on 18 September 2019, of an increase in capital contrary to the pre-emption rights provided for in Banca Carige's statutes;

– the sufficiently serious breach by the ECB of Italian law in relation to the appointment of temporary administrators who had a conflict of interest;

– the sufficiently serious breach by the ECB, when adopting the early intervention measure, of various rules and principles;

– the sufficiently serious breach by the ECB, in the own funds decision, of the principle of proportionality as a result of the imposition on Banca Carige of a period of time that was too short to allow it to comply with the own funds requirements imposed on it;

– the sufficiently serious breach by the ECB of the principle of the protection of legitimate expectations as a result of the assurances given to shareholders as to the situation of Banca Carige;

– the sufficiently serious breach by the ECB of the shareholders' right to property as a result of the significant reduction in the value of their shareholdings in Banca Carige.

36. After a detailed analysis of these instances of unlawful conduct alleged against the ECB, the General Court concluded (paragraphs 216 and 217 of the judgment under appeal) that none of them gave rise to non-contractual liability within the meaning of the third paragraph of Article 340 TFEU.

37. The General Court therefore dismissed the action without it being necessary to assess whether the other conditions required for a finding of liability of an EU institution were met and without having to rule on the measures of inquiry requested by the applicants.

IV. Procedure before the Court of Justice

38. On 14 August 2024, Malacalza Investimenti and Mr Malacalza lodged an appeal seeking to have the judgment under appeal set aside and the case referred back to the General Court. In the alternative, they argue that the Court of Justice should decide the action directly and grant the forms of order sought. They also ask that the ECB and the Commission be ordered to pay the costs.

39. In support of their appeal, the appellants rely on seven grounds of appeal, subdivided into several parts and preceded by preliminary observations.

40. The ECB contends that the Court of Justice should dismiss the appeal as inadmissible or, in the alternative, as unfounded, and in either case order the appellants to pay the costs. In the further alternative, the ECB is asking the Court of Justice to refer the case back to the General Court if it decides to uphold the appeal and set aside the judgment under appeal.

41. The Commission contends that the Court of Justice should dismiss the appeal as partly inadmissible or invalid and wholly unfounded and order the appellants to pay the costs.

42. At the Court's direction, my Opinion will deal exclusively with the first part of the second ground of appeal.

V. Preliminary considerations on the ECB's non-contractual liability as prudential supervisor

43. One of the key issues raised in the dispute before the General Court concerned the EU's non-contractual liability regime for the prudential supervision of credit institutions.

44. The ECB, supported by the Commission, advocated a special, stricter regime, similar to that of some Member States,[9] which would limit the liability of supervisory authorities to cases of intentional fault or serious misconduct. In their view, that approach:

– should be followed at EU level in accordance with the general principles common to the laws of the Member States as referred to in the third paragraph of Article 340 TFEU;

– is necessary in order to preserve the ECB's actions by allowing it to act in the public interest without being paralysed by the fear of being called into question even in the event of slight fault or mere unlawfulness.

45. In the judgment under appeal, the General Court did not accept a *special* non-contractual liability regime for the ECB's prudential supervision of credit institutions. Conversely, it applied the rules generally applicable to all the institutions and bodies of the Union: there must be a sufficiently serious breach of a rule conferring rights on individuals.[10]

46. The appeal does not specifically concern this part of the judgment under appeal: the ECB and the Commission have not brought a cross-appeal challenging the General Court's refusal to recognise special and more restrictive rules of non-contractual liability for the ECB in the exercise of its prudential supervisory powers.

47. However, for the purpose of developing this Opinion, I consider it appropriate to point out that the general rules governing non-contractual liability established by the case-law of the Court of Justice seem to me to be adequate and sufficient to determine the non-contractual liability of the ECB. These rules allow the ECB to carry out its prudential supervisory tasks without being threatened or constrained by the claims of aggrieved economic operators any more than is the case with other Union institutions.

[9] Busch, D. and McMeel, G., 'Liability of Financial Supervisors and Resolution Authorities: Perspectives from Comparative and European Union Law', *European Business Law Review*, Vol. 34, No 5, 2023, p. 725; Busch, D., Gortsos, C. and McMeel, G., *Liability of financial supervisors and resolution authorities*, Oxford University Press, Oxford, 2022; and Almhofer, M., 'The liability of authorities in supervisory and resolution activities', in Zilioli, C. and Wojcik, K.-P. (eds), *Judicial Review in the European Banking Union*, Edward Elgar, Cheltenham, 2021, pp. 221 to 234.

[10] Judgment under appeal, paragraphs 48 to 57.

48. For the exercise of its prudential supervisory powers, Article 4 of Regulation No 1024/2013 empowers the ECB to adopt certain measures,[11] and the adoption of those measures must be preceded by an assessment of the risk profile of the credit institutions concerned. The ECB is required to indicate – for each institution – which events could have an impact on its situation, taking into account the diversity of the institutions, their size and their business models.[12]

49. Prudential supervisory actions are 'interventionist' measures in terms of the operations of credit institutions: they can have obvious economic repercussions on their shareholders, and on the financial system as a whole.

50. Prudential supervision analyses and measures involve assessments that, because of their complex nature, make it legitimate for the ECB to be given broad discretion in that regard, according to the case-law of the Court of Justice.[13]

51. Prudential supervision is an activity in the general interest intended to maintain financial stability. This competence has been attributed to the ECB because of its in-depth knowledge of the financial system. This justifies the ECB's broad discretion to adopt the most appropriate prudential supervisory measures in each case.

52. The ECB commits a sufficiently serious breach of EU law, within the meaning of the Court of Justice's case-law on non-contractual liability, if it gravely and manifestly disregards the limits imposed on its discretion when adopting prudential supervision measures.[14]

53. A grave and manifest disregard of EU rules by the ECB would usually involve conduct amounting to intentional fault or grave misconduct. However, certain types of conduct by the ECB lacking these attributes (intentional fault or grave misconduct), but consisting of manifestly erroneous or inappropriate prudential supervisory measures, could also give rise to ECB liability.

54. As I said above, the ECB's decisions are taken in such technical and complex fields as the prudential supervision of financial institutions. However, this does not preclude the application to such decisions of the appropriate level of judicial review in order to comply with the requirements of the rule of law, as is the case for each of the institutions, bodies offices and agencies of the European Union. They are all subject to scrutiny as to the conformity of their acts, in particular with the Treaties and with the general principles of law.[15]

[11] Among others, authorising and withdrawing banking licences, monitoring the application of existing regulatory prudential requirements and internal risk assessment systems, the possibility of imposing additional own funds requirements and the possibility of imposing appropriate governance rules.

[12] See recital 17 of Regulation No 1024/2013.

[13] Judgments of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB* (C-450/17 P, EU:C:2019:372, paragraph 86), and of 4 May 2023, *ECB* v *Crédit lyonnais* (C-389/21 P, EU:C:2023:368, paragraph 55).

[14] In relation to the national non-contractual liability rules applied by the Slovenian prudential supervisor in respect of the reorganisation measures for credit institutions, the judgment of 13 September 2022, *Banka Slovenije* (C-45/21, EU:C:2022:670, paragraph 75), stated that 'in view of the high degree of complexity and urgency characterising the implementation of reorganisation measures within the meaning of Directive 2001/24, such a liability regime cannot be applied to damage resulting from the implementation of those measures by a national central bank, without requiring that the infringement of the duty to exercise due care alleged against it be of a serious nature'.

[15] Judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23); of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 281); and of 26 June 2012, *Poland* v *Commission* (C-336/09 P, EU:C:2012:386, paragraph 36).

55. A non-contractual liability action is, in that context, an indirect means of verifying the legality of the ECB's acts. The third paragraph of Article 340 TFEU states, in particular, that the ECB shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

56. According to the Court of Justice:

– The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of 'fault going beyond that of a sufficiently serious breach of [EU] law'. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the EU legal order. [16]

– As regards the intentional nature of the public authority's action in the field of banking supervision, EU law 'precludes national legislation which makes the right of individuals to obtain compensation subject to the additional condition, going beyond a sufficiently serious breach of Union law based on the intentional nature of the conduct'. [17]

57. My analysis of the first part of the second ground of appeal will therefore be based on the same premiss as that adopted by the General Court: the criteria laid down in the case-law of the Court of Justice on the non-contractual liability of the institutions and bodies of the European Union must be applied to the ECB.

58. According to that case-law, for the EU's non-contractual liability under the second paragraph of Article 340 TFEU to arise, the following cumulative conditions must be met: [18]

– the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals;

– the fact of damage; and

– the existence of a causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties.

59. The first condition, which concerns the unlawfulness of the conduct alleged against the EU institution, body, office or agency concerned, comprises two parts, namely that it is necessary (i) that a breach of a rule of EU law intended to confer rights on individuals has occurred and (ii) that that breach is sufficiently serious. [19]

60. With regard to the first aspect of this condition, the Court of Justice has held that:

– 'The rights of individuals arise not only where they are expressly granted by provisions of EU law, but also by reason of positive or negative obligations which those provisions impose in a

[16] Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 79).

[17] Judgments of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249, paragraph 121), and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807; 'the judgment in *Kantarev*', paragraphs 126 to 128).

[18] Judgments of 5 March 2024, *Kočner* v *Europol* (C-755/21 P, EU:C:2024:202, 'the judgment in *Kočner* v *Europol*', paragraph 117); of 28 June 2022, *Commission* v *Spain (Breach of EU law by the legislature)* (C-278/20, EU:C:2022:503, paragraph 31); of 10 September 2019, *HTTS* v *Council* (C-123/18 P, EU:C:2019:694, paragraph 32); the judgment in *Kantarev* (paragraph 94); and of 4 July 2000, *Bergaderm and Goupil* v *Commission* (C-352/98 P, EU:C:2000:361, paragraph 42).

[19] The judgment in *Kočner* v *Europol*, paragraph 118, and the judgment of 10 September 2019, *HTTS* v *Council* (C-123/18 P, EU:C:2019:694, paragraph 36).

clearly defined manner, whether on individuals, on the Member States or on the EU institutions, bodies, offices and agencies'. [20]

– 'The failure to meet such obligations is liable to affect adversely the rights implicitly conferred on individuals under the provisions of EU law in question. The full effectiveness of those rules of EU law and the protection of the rights which they are intended to confer require that individuals have the possibility of obtaining redress'. [21]

61. It is not essential, for the purposes of the present case, for the provisions alleged to have been infringed to have direct effect. [22]

62. The requirement that the rule infringed must confer rights on individuals has not given rise to excessive litigation before the Courts of the European Union: rather, it has concentrated on examining whether the infringement of the rule of EU law (which confers rights on individuals) is sufficiently serious.

VI. Analysis of the first part of the second ground of appeal

63. As I noted above, at the Court's direction, my Opinion will deal exclusively with the first part of the second ground of appeal.

64. By the second ground of appeal, the appellants contend that the General Court infringed Articles 69-*octiesdecies* and 69-*noviesdecies* of the TUB, read together with Articles 4 and 16 of Regulation No 1024/2013 and the principles of the protection of legitimate expectations, equal treatment, proportionality, protection of property, prohibition of abuse of rights and the burden of proof.

65. The first part of this second ground of appeal focuses specifically on Article 69-*octiesdecies* of the TUB. According to the appellants, the General Court erred in law in finding that the national rules adopted to transpose Articles 27 to 29 of Directive 2014/59 do not confer rights on the shareholders of the banks concerned.

66. The General Court's reasoning was set out in the following arguments in the judgment under appeal:

– '… under Article 69*octiesdecies*(1)(a) of the [TUB], the Banca d'Italia (Bank of Italy) may adopt the early intervention measures referred to therein where, as a result of a rapid deterioration in the situation of the bank concerned or of its group, it finds there to be or foresees, inter alia, an infringement of [Regulation No 575/2013] and of Title II of [Directive 2014/65]'. [23]

[20] The judgment in *Kočner* v *Europol*, paragraph 119; and judgments of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution)* (C-61/21, EU:C:2022:1015; 'the judgment in *Ministre de la Transition écologique*', paragraph 46); and of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands* (C-819/19, EU:C:2021:904, paragraph 47).

[21] The judgment in *Kočner* v *Europol*, paragraph 120, and judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraphs 33 and 34).

[22] The judgment in *Ministre de la Transition écologique*, paragraph 47: 'direct effect is neither necessary … nor sufficient in itself … for the first of the three conditions referred to [(that the rule infringed is intended to confer rights on individuals)] … to be satisfied'. Also, judgments of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 108 and 109), and of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraphs 18 to 22).

[23] Judgment under appeal, paragraph 120.

– 'Article 69*octiesdecies*(1)(a) of the [TUB] applies to the ECB by virtue of Article 9 of Regulation No 1024/2013, according to which that institution is to act as the competent authority in place of the national authority where, as in the present case, the institutions to be supervised fall within its remit under Article 4 of Regulation No 1024/2013'. [24]

– 'It follows that, in so far as Article 69*octiesdecies*(1)(a) of the [TUB] merely gives the supervisory authority the power to adopt an early intervention measure where, at the end of its assessment, the conditions which it lays down are satisfied, it does not in itself confer on individuals rights the observance of which they may request that the Courts of the European Union ensure'. [25]

– 'Any effect produced by an intervention on the part of the ECB on the interests of the shareholders of a credit institution cannot be taken into account in order to establish the non-contractual liability of that institution if the rule on which that intervention is based is not intended specifically to create or protect a right conferred on them in a sufficiently defined manner'. [26]

– 'It must be held that in pursuit of an objective of public interest, Article 69*octiesdecies*(1)(a) of the [TUB] is not intended to confer rights on individuals, and that it was indeed in order to achieve that objective that it was implemented in the present case with the adoption of the early intervention measure, with the consequence that the first complaint must be rejected'. [27]

67. As I will argue below, I am not convinced that the reasoning of the General Court in this part of the judgment, in particular paragraph 129, is legally correct.

A. Nature of the measures imposed by the ECB and effects on shareholders' rights

68. I will start by recalling that *early intervention* was enshrined in two decisions of the ECB of 9 December 2016. In the first decision, the ECB adopted an early intervention measure by requesting Banca Carige to submit, by 28 February 2017, a strategic plan and an operational plan to reduce the issue of non-performing loans. In the second decision, after analysing Banca Carige's financial situation, the ECB considered that the requirements of Article 16(1)(c) of Regulation No 1024/2013 were met and, therefore, the credit institution should take the actions provided for in Article 16(2)(a), (i), (j) and (k) thereof. [28]

69. The latter provision provides – under the respective points – for the following measures that the ECB may impose:

'(a) to require institutions to hold own funds in excess of the capital requirements laid down in the acts referred to in the first subparagraph of Article 4(3) related to elements of risks and risks not covered by the relevant Union acts;

…

[24] Judgment under appeal, paragraph 121.

[25] Judgment under appeal, paragraph 122.

[26] Judgment under appeal, paragraph 124.

[27] Judgment under appeal, paragraph 129.

[28] This refers to ECB Decision ECB/SSM/2016 – F1T87K3OQ20V1UORLH26/26 of 9 December 2016, which establishes requirements based on Article 69*octiesdecies* and Article 69*noviesdecies* of the TUB for Banca Carige; and to ECB Decision ECB/SSM/2016 – F1T87K3OQ20V1UORLH26/25 of 9 December 2016, which establishes prudential requirements for Banca Carige, paragraphs 1.3.2, 1.3.3 and 1.3.4.

(i) to restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution;

(j) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions;

(k) to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities;'

70. The early intervention measures imposed by the ECB in its decisions of 9 December 2016 had an impact on the legal position of Banca Carige's shareholders, both directly and indirectly. They were certainly intended to ensure the stability of the financial system, but they also had to protect the interests of depositors and the shareholders of credit institutions. [29]

71. In particular, the early intervention measure imposed on Banca Carige (on the basis of Article 16(2)(i) of Regulation No 1024/2013), which prohibited or restricted the distribution of dividends to shareholders, members or holders of additional Tier 1 capital instruments, had a direct impact on the primary right of a shareholder of a company, namely to receive dividends on its shares.

72. The other early intervention measures imposed on Banca Carige by the ECB [30] were intended to correct the bank's decisions in order to halt the deterioration of its financial position. All of these measures also had an impact on the rights of the shareholders.

73. If these early intervention measures could be considered manifestly erroneous or inappropriate, the ECB would have caused a deterioration of Banca Carige's financial position and, consequently, its shareholders' rights would be diminished. This would constitute a breach by the ECB of the provisions of Regulation No 1024/2013 which, at the same time, could infringe the rights implicitly derived for shareholders from that text under EU law.

74. To ensure the full effectiveness of Regulation No 1024/2013 and the protection of the right of shareholders not to have the ECB, by its conduct, inflict on them damage to their legal position that they are not obliged to bear, if such conduct has been adopted in (a sufficiently serious) breach of the relevant provisions, those shareholders must have the possibility of obtaining redress by asserting non-contractual liability on the part of the ECB.

[29] In accordance with recital 47 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), 'supervision of institutions on a consolidated basis aims to protect the interests of depositors and investors of institutions and to ensure the stability of the financial system'.

[30] These are the measures laid down in Article 16(2)(a), (j) and (k) of Regulation No 1024/2013: to require institutions to hold own funds in excess of the capital requirements laid down in the acts referred to in the first subparagraph of Article 4(3) related to elements of risks and risks not covered by the relevant Union acts; to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions; and to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities.

75. The recent judgment in *ECB and Commission* v *Corneli* is highly relevant in this respect. [31] In that judgment, the Court of Justice accepted that Ms Corneli, as a shareholder of Banca Carige, had *locus standi* to bring an action before the General Court for annulment of the ECB's decision to place that institution under temporary administration, which was another episode in the ECB's prudential supervision of Banca Carige. [32]

76. In the judgment in *ECB and Commission* v *Corneli*, the Court of Justice recognises Ms Corneli's direct concern [33] and her interest in seeking annulment of the ECB's decisions on the grounds that 'she was of the opinion that she had suffered damage as a result of the decisions taken by Banca Carige's temporary administrators, appointed by the ECB, for which she intended to seek compensation'. [34]

77. If Ms Corneli could bring an action for annulment against the ECB's decision on the temporary administration of the bank (because her status as a shareholder made her a person directly and individually concerned and with an interest in bringing an action for annulment), it is logical to infer that she also had the possibility to claim that the ECB had non-contractual liability in relation to that decision.

78. Thus, in the Court of Justice's view, the rules governing the temporary administration measures of a credit institution adopted by the ECB implicitly confer on the shareholders of that institution both the possibility of challenging those measures in court and, where appropriate, the right to bring an action against the ECB for non-contractual liability.

79. Transposing this reasoning to the legal situation of Malacalza Investimenti and Mr Malacalza in relation to Banca Carige's early intervention measure, I believe that both situations are comparable. Thus, Malacalza Investimenti and Mr Malacalza had *locus standi* to bring an action for annulment of the early intervention measure and to bring an action for non-contractual liability against the ECB.

80. The General Court emphasises (paragraphs 126 and 129 of the judgment under appeal) that the ECB, by imposing the early intervention measure on Banca Carige, was pursuing the public interest of maintaining the stability of the financial system. But, in fact, this same public interest focus must be present in all the ECB's decisions, without exception, which does not mean that it can ignore the rights of the shareholders of that institution, which it must also ensure are respected.

81. The rights of the shareholders of the credit institution are the reverse side of the obligations, positive and negative, that the EU rule imposes on the ECB. [35] If the ECB, while having broad discretion, does not meet its obligation to comply with the rules of Regulation No 1024/2013

[31] Judgment of 15 July 2025, *ECB and Commission* v *Corneli* (C-777/22 P and C-789/22 P, EU:C:2025:580; 'the judgment in *ECB and Commission* v *Corneli*'). This judgment concerns the rights of a minority shareholder of Banca Carige, who was affected by the ECB's decision to place the bank into temporary administration. This appeal, on the other hand, is based on the substance of the early intervention measures imposed by the ECB on the same credit institution.

[32] Points 26 to 29 of this Opinion.

[33] The judgment in *ECB and Commission* v *Corneli*, paragraph 66: 'from the time Banca Carige was placed under temporary administration and for as long as that situation continued, Ms Corneli was deprived, at the very least, of the possibility of exercising her right, as a shareholder of that bank, to join other shareholders in that bank in order to exercise collectively one or other of the rights referred to in the preceding paragraph. That is an effect on Ms Corneli's legal situation which follows directly from the adoption of the decisions at issue, which left no discretion to their addressee in that regard'.

[34] The judgment in *ECB and Commission* v *Corneli*, paragraph 101.

[35] The judgment in *Kočner* v *Europol*, paragraphs 119 and 120.

governing the adoption of an early intervention measure, I do not see how it can be denied that individuals affected by that measure may have recourse to the Courts of the European Union, either by way of an action for annulment or by way of an action for non-contractual liability.

B. Case-law of the Court of Justice on infringement of EU legal provisions not conferring rights on individuals

82. This conclusion must be tested against the (rather sparse) case-law of the Court which recognises the existence of rules of EU law that do not confer rights on individuals for the purposes of engaging the non-contractual liability of the EU institutions.

83. In the financial sphere, in the judgment in *Paul and Others*, [36] the Court dismissed a claim for compensation after determining that the provisions at issue were *not* intended to confer rights on individuals.

84. The judgment in *Paul and Others* dealt with provisions that had the aim, inter alia, of protecting depositors of credit institutions. The relevant rules were characterised by their considerable complexity and did not expressly mention the rights of individuals. [37]

85. In this specific regulatory framework, the Court:

– Considered that the deposit guarantee [38] constituted a special regime for the protection of depositors, which argued against granting them, in addition, a right to redress. [39] There was thus no need for State liability towards depositors that was not provided for or was even excluded by domestic law. [40]

– It held that, where national law has established a deposit-guarantee scheme, Directive 94/19 does not preclude national legislation which limits individuals from claiming damages for harm sustained by insufficient or deficient supervision on the part of the national authority supervising credit institutions or from pursuing State liability under EU law on the ground that those responsibilities of supervision are fulfilled in the general interest. [41]

86. Subsequently, however, in the same sphere, the Court held that 'Article 1(3)(i) of Directive 94/19 … constitutes a rule of law intended to confer rights on individuals allowing depositors to bring an action for damages for the harm sustained by late repayment of deposits'. [42]

[36] Judgment of 12 October 2004, *Paul and Others* (C-222/02, EU:C:2004:606; 'the judgment in *Paul and Others*', paragraphs 38, 41, 44 and 46).

[37] The judgment in *Paul and Others*, paragraph 42. The main purpose of these rules in force at that time was to secure the mutual recognition of authorisations and of prudential supervision systems. This allowed for the granting of a single authorisation to banks, valid throughout the European Union, and the application of the principle of supervision by the Member State of origin.

[38] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5).

[39] The judgment in *Paul and Others*, paragraph 45.

[40] The judgment in *Paul and Others*, paragraph 43.

[41] The judgments in *Kantarev*, paragraph 90, and in *Paul and Others*, paragraph 32.

[42] The judgment in *Kantarev*, paragraph 4 of the operative part. In paragraphs 102 to 104 of that judgment, the Court explained that the determination of the unavailability of deposits has a direct impact on the legal situation of a depositor, in that it triggers the deposit guarantee mechanism and thus the reimbursement of deposits to depositors. The Court stated in its judgment of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249, paragraph 60), that Article 7(6) of Directive 94/19 must be interpreted as meaning that the depositor's right to compensation which it provides for covers only the repayment, by the deposit-guarantee scheme, up to the amount laid down in Article 7(1a) of that directive.

87. A reading of the judgments in *Paul and Others* and in *Kantarev* reveals the difficulties in adopting a uniform approach in this area. It will therefore be necessary to interpret critically each provision, in the light of its purpose and context, in order to determine the appropriate response.

88. In areas other than financial regulation, the Court has also ruled against recognising that the infringed rule of EU law is intended to confer rights on individuals:

– in the judgment in *Berlington Hungary*,[43] the Court held that Directive 98/34[44] creates neither rights nor obligations for individuals, so that individuals cannot rely on the infringement of Articles 8 and 9 thereof to establish liability on the part of the Member State concerned on the basis of EU law;

– in the judgment in *Ministre de la Transition écologique*, the Court applied the same negative test in relation to Article 13(1) and Article 23(1) of Directive 2008/50,[45] rejecting the idea that they attribute rights to individuals, directly or implicitly.[46]

89. In my view, the appeal to general objectives (for example, the protection of health and the environment in general) is not sufficient to reject the possibility that the rules inspired by them implicitly attribute rights to individuals.

90. While such a consequence might be acceptable in the material areas referred to in the judgments I have just cited, this will not be the case in other areas characterised by the more pronounced (and negative) impact of the respective provisions on the legal and financial situation of those affected.

91. As I have already indicated, the early intervention measures taken by the ECB in respect of Banca Carige directly and indirectly hindered the exercise of shareholders' rights, having adverse effects on their legal and property situation. This incontrovertible fact is not altered by the fact that the ECB's action in adopting these measures pursued the general interest objective of safeguarding the financial stability of the European Union.

92. Therefore, those shareholders had the possibility to obtain redress, where the early intervention measures, in addition to adversely affecting their economic rights, were a manifestly serious breach of a rule of EU law and there was a causal link between the breach and the damage suffered.

[43] Judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 108 and 109).

[44] Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

[45] Directive of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).

[46] The judgment in *Ministre de la Transition écologique*, paragraph 56: '… besides the fact that the provisions concerned of Directive 2008/50 and the directives which preceded it do not contain any express conferral of rights on individuals in that respect, it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals'. Paragraphs 54 and 55 of that judgment state that the relevant articles of Directive 2008/50 and other analogous provisions lay down 'fairly clear and precise obligations as to the result to be achieved by Member States', but that, 'however, those obligations pursue … a general objective of protecting human health and the environment as a whole'.

93. Given the discretion available to the ECB in adopting early intervention measures, it will probably not be easy to prove that there was a sufficiently serious breach of the applicable rules of EU law, but this can only be established after a proper analysis of the merits of the appellants' allegations.

94. In the light of the foregoing reasoning, I consider that the General Court erred in law in paragraphs 119 to 129 of the judgment under appeal. I therefore propose that the Court of Justice uphold the first part of the second ground of appeal and set aside that part of the judgment of the General Court.

VII. The action before the General Court

95. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, where it sets aside the decision of the General Court, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

96. Given the very limited nature of my analysis of the appeal, which is confined to the first part of the second ground of appeal, I am not in a position to propose that the Court of Justice give final judgment in the matter. It seems to me more prudent, in those circumstances, and in view of the fact that, if that part of the second ground is upheld, it is necessary to consider the merits of the reasons put forward by the applicants before the General Court, to refer the case back to the General Court for judgment.

VIII. Award of costs

97. For the same reasons, it is not appropriate for me to rule on the imposition of costs.

IX. Conclusion

98. In the light of the foregoing, I propose that the Court of Justice uphold the first part of the second ground of appeal, setting aside paragraphs 119 to 129 of the judgment of the General Court of 5 June 2024, *Malacalza Investimenti and Malacalza* v *ECB* (T-134/21, EU:T:2024:362).

[i] The wording of points 68 and 70 of, and of footnote 28 to, this document have been amended since it was first put online, in order to include ECB Decision ECB/SSM/2016 – F1T87K3OQ20V1UORLH26/26 of 9 December 2016.